



WASHINGTON
LEGISLATIVE OFFICE

October 15, 2007

Support Free Flow of Information Act of 2007, H.R. 2102, without amendment.

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we are writing to urge you to support H.R. 2102, the Free Flow of Information Act of 2007, without amendment.

H.R. 2102 is a bipartisan bill that codifies a journalists' privilege for federal court proceedings that is already available in forty-nine states and D.C. As the Attorneys General of 34 states and D.C. have observed, "The consensus among the States on the reporters' privilege is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable." This Act is needed to fix those problems.

H.R. 2102 breaks no new ground. It codifies the existing Department of Justice guidelines for subpoenaing journalists, with one important addition. It provides for oversight by a federal court, instead of vesting unfettered discretion in the Attorney General. Recent events have shown what happens where that constitutional check is missing for journalists. Confidential sources broke stories about illegal government programs including torture, warrantless wiretapping, kidnapping, unlawful detention, and illicit national security letters. In retaliation, an unchecked executive branch has used subpoenas to intimidate journalists into revealing their sources or chilling their publication of embarrassing or illegal activities.

H.R. 2102 adopts a balanced approach to ensuring that the public has access to the free flow of information consistent with public safety. It provides a qualified privilege for journalists that generally protects against forced disclosure of sources. It adopts a balancing test that requires the party seeking privileged information to show by a preponderance of evidence: (1) the information is unavailable from another source; (2) it is critical to the prosecution or defense of a case; and (3) the public interest in compelled disclosure outweighs the public interest in gathering or disseminating news or information. It ensures that in most cases, a journalist will be given notice and an opportunity to be heard before being compelled to disclose privileged information.

The Act has narrow exceptions for protecting other competing rights and interests. The privilege will not apply where it is shown that disclosure is necessary to prevent an act of terrorism or imminent death or significant bodily harm. It also includes an exception to ensure that criminal defendants have access to sources and information that may be exculpatory or might mitigate their sentences.

H.R. 2102 adopts a functional approach to the definition of journalist that is consistent with protecting the public's interest in news. The Act only covers persons who engage in acts of journalism for financial gain or livelihood, focusing on whether the information from confidential sources is secured for dissemination to the public.

We have some concerns about the amendment being offered in the nature of a substitute. The amendment permits compelled disclosure in cases involving leaks of "properly classified information" and adds three new exceptions to the definition of "covered person." That language is problematic if the government alone decides what is "properly classified" and who qualifies as a journalist. The administration is over-classifying, reclassifying, and impeding the declassification of documents at record levels, and arbitrarily designates individuals as terrorists based on unsubstantiated allegations and overbroad restrictions on association and speech. The right to a free press is meaningless if the government is the sole arbiter of information the public can receive and from whom they can receive it.

We know you share our commitment to a free press and the free flow of information to the public. **Vote YES on H.R. 2102, without amendment.**

Sincerely,

Caroline Fredrickson
Director

James Thomas Tucker
Policy Counsel

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15TH STREET, NW, 6TH FL
WASHINGTON, DC 20005-2313
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

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